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No. 77-1176

In the

Supreme Court of the United States

OCTOBER TERM, 1977

NABISCO, INC. and PEPSI-COLA GENERAL BOTTLERS, INC.,

Appellants,

vs.

BERNARD KORZEN, et al.,

Appellees.

Appeal from the Supreme Court of Illinois.

MOTION TO DISMISS OR AFFIRM

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The defendants-appellees in the above-entitled cause respectfully move this Court to dismiss this appeal on the grounds that the questions presented are so insubstantial as not to need further argument. Alternatively, the defendants-appellees move that the judgment of the Illinois Supreme Court be affirmed since it is clearly correct.

ARGUMENT

I.

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION SINCE EVEN NORTHWESTERN UNIVERSITY, THE HOLDER OF THE CHARTER EXEMPTION AND THE PARTY ON WHOM THE ECONOMIC BURDEN OF THE TAX ULTIMATELY FALLS, ADMITS THAT ITS LESSEES MAY BE ASSESSED A LEASEHOLD TAX.

The Illinois Supreme Court has held that Northwestern's Charter tax exemption cannot be extended so as to proscribe the assessment of a leasehold tax on a lessee of Northwestern. The Illinois Supreme Court grounded its ruling on this Court's decision in the similar case of *Jetton* v. *University of the South,* 208 U.S. 489, 28 S.Ct. 375, 52 L.Ed. 584 (1908). In *Jetton,* this Court held:

> "As long as different interests may exist in the same land, we think it plain that an exemption granted to the owner of the land in fee does not extend to an exemption from taxation of an interest in the same land, granted by the owner of the fee to another person as a lessee for a term of years. The two interests are totally distinct, and the exemption of one from taxation plainly does not thereby exempt the other." [208 U.S. at 500, 28 S.Ct. at 377, 52 L.Ed. at 588.]

Accordingly, in light of the United States Supreme Court's clear holding, appellees respectfully suggest that there is no substantial federal question in the case at bar to be considered. Indeed, as the Illinois Supreme Court noted (Appellants App., p. 10), Northwestern University (in its *Amicus* filing), the holder of the Charter exemption, has not argued that a leasehold tax is entirely illegal and unconstitutional, but rather that the leaseholds in question have been erroneously and excessively assessed:

> "The issue . . . is not whether a lessee's leasehold interest is a separate property interest subject to tax. Such leasehold interests have been subject to tax for decades in Illinois and elsewhere." [Northwestern's *Amicus* Brief in the Illinois Supreme Court, pp. 25-26.]
>
> "Instead of taxing the leaseholds on what those leaseholds are actually worth, Cook County used as the assessed valuations the amounts attributed to the values of the *improvements* on the properties." [Northwestern's *Amicus* Brief in the United States Supreme Court, p. 7.]

Northwestern has never objected to the leasehold tax as properly assessed and levied against its lessees. Northwestern has objected, rather, to the method of assessment and assessed valuations in the case at bar. However, neither plaintiffs (Nabisco and Pepsi-Cola) ever argued before the Illinois Supreme Court that the method of assessment or assessed valuations were erroneous. Plaintiffs argued only that the tax *in toto* was unconstitutional. Northwestern's arguments are not properly presented.

Moreover, the Illinois leasehold tax and leasehold tax act were in effect prior to the Illinois legislature's grant of Northwestern's Charter exemption in 1855. Illinois Laws of 1853, p. 39, § 5; *LaSalle County Manufacturing Co.* v. *City of Ottawa,* 16 Ill. 418 (1855). Indeed, counsel for Pepsi-Cola General Bottlers, Inc. has represented to the trial court that the Continental Illinois National Bank, a lessee of Northwestern, has been paying approximately one million dollars per year to the County Collector for leasehold taxes. (No. 48313, R. 107.) Notwithstanding plaintiff's arguments to the contrary, lessees of Northwestern have been assessed leasehold taxes for many years. See, *In re Northwestern University,* 206 Ill. 64 (1903)

where the court noted that the leasehold tax was being assessed. See also Gale, *Assessment and Collection of Taxes,* 1952 U. Ill. L. F. 192, 195, where it was noted that lessees of Northwestern were being assessed a leasehold tax.

Finally, it should be noted that the Supremacy Clause does not bar state and local governments from assessing leasehold or use taxes to lessees of the United States. And this is true notwithstanding the fact that the economic burden of the tax may fall on the United States. *United States* v. *City of Detroit,* 355 U.S. 466, 78 S.Ct. 474, 2 L. Ed.2d 424 (1958); *United States* v. *County of Fresno,* 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977).

The appellees respectfully submit that the foregoing analysis clearly demonstrates that the matters which the appellants seek to raise in this appeal are questions of State law which only peripherally touch upon federal law.

II.

THE ILLINOIS SUPREME COURT CORRECTLY HELD THAT THE LEASEHOLD TAX IS NOT AN UNCONSTITUTIONAL IMPAIRMENT OF NORTHWESTERN'S CHARTER EXEMPTION.

The Illinois Supreme Court's decision is clearly correct. *Jetton* v. *University of the South,* 208 U.S. 489, 28 S.Ct. 375, 52 L.Ed. 584 (1908), is virtually indistinguishable from the case at bar. The plaintiffs' reliance on *Wright* v. *Central of Georgia Ry.,* 236 U.S. 674, 35 S.Ct. 471, 59 L.Ed. 781 (1915) and *Central of Georgia Ry.* v. *Wright,* 248 U.S. 525, 39 S.Ct. 181, 63 L.Ed. 401 (1918), is misplaced. Those cases dealt with a railroad company leasing out its right-of-way to another railroad company. The property, however, was still *used* as a railroad. This Court held that since the Georgia legislature intended

that railroads expand, the exemption to the lessor should be available to a lessee who uses the right-of-way for the intended purpose—as a railroad. Indeed, this Court stated:

> "We are not suggesting that the contract in the charters of the lessors passed by assignment to the lessee, *nor are we implying that the property was exempted generally, into whosoever hands it might come.*" [Emphasis added.] [236 U.S. at 680, 35 S.Ct. at 472, 59 L.Ed. at 785.]

The thrust of plaintiffs' argument, though, is that all lessees of Northwestern, regardless of the use to which they put the leased property, are exempt from a leasehold tax. However, plaintiffs' arguments are refuted by the very case upon which they attempt to rely. It should also be noted that the *Wright* cases have never been followed or cited by any court for the proposition plaintiffs now urge upon this Court. *Jetton* and the underlying rationale of it, however, have been followed to sustain leasehold taxes. See *Iron County* v. *State Tax Commission,* 437 S.W. 2d 665 (Mo., 1968) and *Otter Trail Power Co.* v. *Degnan,* 252 N.W. 619 (N.D., 1934).

Nabisco also argues that, "as to any period when the burden of the leasehold tax is borne by Northwestern's lessees . . ., the tax would violate the lessees' rights to equal protection of the laws."* However, Nabisco has

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* Plaintiff Pepsi-Cola never pleaded this alleged Constitutional deprivation in its Complaint, and Pepsi-Cola did not argue this point in its initial brief before the Illinois Supreme Court. Pepsi-Cola has waived the argument. Note that the Illinois Supreme Court refers only to Nabisco's equal protection challenge. (Appellants' App., p. 9.)

pleaded in its Complaint and argued that the economic burden of the leasehold tax, as assessed to Nabisco in the case at bar, will ultimately be passed on to Northwestern due to their contractual agreement. Nabisco has therefore admitted that its equal protection rights have not been violated even though the leasehold tax has been sustained. Moreover, and in any event, this Court's decision in *Trimble* v. *City of Seattle,* 231 U.S. 683, 34 S.Ct. 218, 58 L.Ed. 435 (1913) squarely refutes Nabisco's contention:

> "It is urged that to deny the state's obligation [not to tax its lessees] discriminates unconstitutionally against this class of lessees, since all others are free from the burden. But that is not true. Whether landlord or tenant shall pay a tax is a matter of private arrangement, and the practice one way or the other has no bearing on the matter. The argument from inequality really works the other way. If these leaseholds are not taxable, they are a favored class of property; for ordinarily leaseholds are taxed even if they are lumped and included in the value of the fee." [231 U.S. at 689-90, 34 S.Ct. at 219, 58 L.Ed. at 438-39.]

CONCLUSION

Wherefore, appellees respectfully submit that the questions presented by this cause are so insubstantial as not to need further argument, and that the appeal should be dismissed. Alternatively, appellees respectfully submit that the judgment entered in this cause by the Illinois Supreme Court is clearly correct and should be affirmed.

Respectfully submitted,

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